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DePaul Journal of Health Care Law

Volume 5
Issue 2 *Summer 2002*
Article 9

November 2015

Case Briefs

DePaul College of Law

CASE BRIEFS

CIVIL PROCEDURE

A Plaintiff's Claim Will Be Dismissed for a Failure to State a Claim Upon Which Relief Can Be Granted

The United States District Court for the Northern District of Illinois, Eastern Division dismissed the plaintiff's amended complaint for failure to plead with particularity and for failure to state a claim upon which relief can be granted.[1]

Obert-Hong is a physician and former Advocate employee.[2] Defendants participated in various federal healthcare programs, including Medicare, Medicaid, and Tricare.[3] The relator claimed that defendants illegally offered doctors special benefits to induce them to refer federal patients to its hospitals.[4] Advocate allegedly paid commercially unreasonable amounts to acquire practices, signed doctors to contracts mandating that all referrals be to SSH and paid them a percentage of fees collected for referred patients.[5] The plaintiff alleged that these actions violated the Anti-Kickback act and the Stark Act.[6] Defendants moved to dismiss, arguing that their compliance certifications were not false claims because the alleged practices were permissible under the Anti-Kickback and Stark Laws.[7] They also

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[1] United States v. Obert-Hong, 2002 U.S. Dist. LEXIS 1662 at *1.
[2] *Id.* at *2.
[3] *Id.*
[4] *Id.*
[5] *Id.* at *2.
[6] Obert-Hong, 2002 U.S. Dist LEXIS 1662 at *2.
[7] *Id.* at *3.

maintained that the complaint did not plead fraud with particularity, as is required by the Federal Rules of Civil Procedure 9(b).[8]

The court first looked at the statutory framework of each statute cited in plaintiff's complaint.[9] The court found that the Stark Act statute was designed to prevent abusive self-referrals and the Anti-Kickback Act focused on the circumstances surrounding the referrals themselves.[10] While the court conceded that a hospital's acquisition of a medical practice could implicate the Anti-Kickback act, defendants correctly stated that safe harbors only become consequential if the conduct is otherwise proscribed.[11] The Anti-Kickback Act does not prohibit hospitals from acquiring medical practices, nor does it preclude the seller-doctor from making referrals to the buyer-hospital, provided there are no economic inducements for the referral.[12] The court then stated that the Stark Act statute contains an exception for isolated transactions, even though a hospital's acquisition of a hospital can implicate the Act's prohibition of financial relationships between referring physicians and referee-hospitals.[13]

The court next said that the defendants' percentage compensation was based on personally performed services, not referrals, there was no economic inducement to refer patients.[14] All compensation paid to these doctors fell within the Anti-Kickback employee exception.[15] Accordingly, the court granted defendants' motion to dismiss.[16] *United States v. Obert-Hong, 2002 U.S. Dist. LEXIS 1662.*

A Case Will Be Dismissed For a Lack of Personal Jurisdiction Against A Defendant and A Failure to File a Health Care Affidavit

The Court of Appeals of Missouri, Eastern District, Division One, found that there was a lack of personal jurisdiction against the Indiana

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[8] *Id.*
[9] *Id.* at *4-6.
[10] *Id.* at *5-6.
[11] Obert-Hong, 2002 U.S. Dist LEXIS 1662 at *7.
[12] *Id.*
[13] *Id* at *8.
[14] *Id.* at *13.
[15] *Id.*
[16] Obert-Hong, 2002 U.S. Dist LEXIS 1662 at *14.

defendants and that plaintiff failed to file a health care affidavit, thereby affirming the decision of the trial court.[17] Plaintiff's motion to strike the brief and/or dismiss the appeal were denied as moot.[18]

Patricia Mello (patient, mother of plaintiff) entered St. Joseph Medical Center (SJMC) on December 19, 1996 for elective femoral bypass surgery.[19] She was treated by: Dr. Giliberto, an osteopathic surgeon; Dr. Gibson, a cardiologist; and Dr. Guentert, a critical care specialist.[20] Plaintiff alleged that defendants were negligent and breached the standard of care in pressuring patient to undergo surgery and in providing post-operative care, which resulted in a drug induced coma, high fever, and pneumonia.[21] On January 1, 1997, plaintiff brought in a new physician to treat patient, and patient was transferred to Barnes-Jewish Hospital (BJH), where plaintiff alleges that BJH, University, and Dr. Lynch committed additional acts of malpractice on plaintiff.[22] Patient died at BJH on February 6, 1997.[23]

Plaintiff sought to recover damages for personal injuries, loss of chance of recovery, battery/lack of informed consent, wrongful death, and violations of various state and federal policies on the care and treatment of the elderly.[24] The court granted Indiana defendants motion to dismiss on the grounds that Missouri lacked personal jurisdiction.[25] Missouri defendants then moved to dismiss on the grounds that plaintiff failed to file a health care affidavit, which was granted.[26] On appeal, plaintiff challenged the dismissal of Indiana defendants for lack of jurisdiction and the dismissal of her claims against the Missouri defendants for failure to file a health care affidavit.[27]

Plaintiff cited two points against Indiana defendants' claim.[28] First, she asserted that the court committed a number of procedural

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[17]Mello v. Giliberto Jr., 2002 Mo. App. LEXIS 233 at *29 (C.A. Mo. Feb 5, 2002).
[18]*Id.*
[19]*Id.* at 1.
[20]*Id.* at 2.
[21]*Id.*
[22]Mello 2002 Mo. App. LEXIS 233 at *2.
[23]*Id.*
[24]*Id* at *2-3.
[25]*Id.*
[26]*Id.*
[27]Mello 2002 Mo. App. LEXIS 233 at *2-3.
[28]*Id.* at *5.

errors in disposing of the motion, which resulted in a denial of due process.[29] She then contended that the Indiana defendants were subject to Missouri's Long Arm Statute because they committed a tort to business transactions in Missouri.[30] The court dismissed the first point by stating that plaintiff failed to show that the trial court erred in the manner in which it handled the motions to dismiss for lack of jurisdiction.[31] The court then stated that the second argument had no weight because plaintiff's theories did not support her claims that defendants committed a tortuous act or conducted business in the state of Missouri.[32]

In opposition to defendant's claim that plaintiff failed to file a health care affidavit, plaintiff argued that no health care affidavit was required in this case.[33] Alternatively, the plaintiff contended that she substantially complied with the statute.[34] The court found that all of the counts in plaintiff's petition were within the statute requiring an affidavit as the plaintiff's claims related solely to the wrongful acts of the health care providers and the damages sought were for patients personal injuries and death.[35] Accordingly, the court of appeals affirmed the decision of the trial court.[36] *Mello v. Giliberto Jr., 2002 Mo. App. LEXIS 233 at *29 (C.A. Mo. Feb 5, 2002).*

A Defendant is Not Liable to Pay Claim Until Liability is Determined In Court

The United States District Court for the District of Massachusetts held that defendant was not liable for failing to pay the claim until after liability was established in court, and defendant was not held liable for intentionally or recklessly causing emotional distress nor for breach of

[29] *Id.*
[30] *Id.*
[31] *Id.* at *11.
[32] Mello 2002 Mo. App. LEXIS 233 at *18.
[33] *Id.* at *22.
[34] *Id.* at *23.
[35] *Id.* at *26.
[36] *Id.* at *29-30.

its insurance contract for failure to pay where liability was not reasonably clear.[37]

Plaintiffs brought action against Dr. Tufo, defendant, for wrongful death and medical malpractice on behalf of their son, Adam Behn.[38] Adam, born on June 27, 1966, had a long history of substance abuse and self destructive behavior.[39] On February 27, 1990, Adam came to Norwood Hospital after attempting suicide by cutting his left wrist.[40] After receiving treatment, Adam was referred to Tufo, a psychiatrist who was affiliated with the hospital.[41] After continuous appointments with Tufo, Adam was hospitalized at Norwood Hospital for taking a combination of alcohol, valium, and codeine.[42] Adam continued treatment after this incident with Tufo.[43] On September 27, 1990, after repeated admissions, Adam was admitted to Arbour Hospital in Boston for treatment of depression and auditory hallucinations with suicidal content.[44] Tufo never heard from Adam or any other member of the Behn family after October of that year.[45] On January 29, 1991, Adam committed suicide by taking 50 tablets of the medication Pamelor.[46] On April 11, 1997, the Middlesex Superior Court, after jury deliberations, awarded the plaintiffs $1,153,900 with a comparative negligence of 25%, which reduced the damages to $915,425.[47] The parties reached a settlement on punitive damages before the verdict was entered.[48]

Legion raised two procedural issues on appeal that it claimed prevented the suit from being properly before the court.[49] It argued that the settlement in the case barred the suit against Legion and that the

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[37]Behn v. Legion Insurance Company, 173 F. Supp. 2d 105, 106 (D. Mass. Nov. 30, 2001).
[38]*Id.* at 107.
[39]*Id.* at 108.
[40]*Id.*
[41]*Id.*
[42]Behn, 173 F. Supp. 2d at 108.
[43]*Id.*
[44]*Id.* at 109.
[45]*Id.*
[46]*Id.*
[47]Behn, 173 F. Supp. 2d at 111.
[48]*Id.*
[49]*Id.* at 112.

statute of limitations ran prior to the filing of the claim.[50] The court found that the liability in the underlying medical malpractice claim was never clearly established.[51] Furthermore, the plaintiff's original demand was in excess of the policy limits and Legion's estimate of potential liability.[52] Accordingly, judgment for the defendant was entered on all counts.[53] *Behn v. Legion Insurance Company, 173 F. Supp. 2d 105, 106 (D. Mass. Nov. 30, 2001).*

EMPLOYMENT LAW

Doctors Practicing in Federally Funded Clinics Were Neither Doctors Nor Covered Contractors Under the FSHCAA

The United States District Court for the Southern District of Florida held the United States correctly showed that doctors practicing at a federally funded clinic were neither employees nor covered contractors under the FSHCAA.[54]

On or about January 10, 1996, Idania Fernandez (plaintiff) presented herself to the Helen B. Bentley Family Health Center for a pregnancy test, which was positive.[55] Plaintiff received prenatal treatment from the Family Health Center from January of 1996 to April of 1996.[56] Throughout the pregnancy, Fernandez experienced complications which she claimed were misdiagnosed by the doctors at Mercy Hospital and the Family Health Center.[57] Due to complications, Fernandez gave birth prematurely to a son, who suffered from severe respiratory and developmental problems.[58]

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[50] *Id.*
[51] *Id.* at 114.
[52] Behn, 173 F. Supp. 2d at 116.
[53] *Id.* at 117.
[54] Delvalle v. Sanchez, 170 F. Supp. 2d 1254,1272 (S.D. Fla. Sep. 25, 2001).
[55] *Id.* at 1259.
[56] *Id.*
[57] *Id.*
[58] *Id.*

Plaintiffs alleged medical negligence in the care of Fernandez during her pregnancy.[59] Defendants filed a counter-claim against he United States and the Coconut Family Health Center, Inc. (co-defendants) for indemnification.[60] Plaintiff's third amended complaint was removed from state court on January 8, 1999 by the Family Health Center and the United States.[61] In the notice of removal, defendants alleged that the Family Health Center was an entity receiving federal grant money and an employee if the United States for the purpose of the Federal Tort Claims Act.[62] On June 24, 1999, the United States was substituted as the proper party defendant in place of the Family Health Center.[63] United States then filed a motion for summary judgment on the cross claim and the fourth amended complaint to the extent that the parties sought to hold the United States liable for the actions of Dr. Sanchez, Dr. Fernandez-Rocha & Pou, P.A.[64] Dr. Sanchez sought summary judgment on the same issue.[65] Mercy Hospital, Dr. Ramon, Dr. Portunado and ERMA filed motions for summary judgment in which they argued that the record was devoid of any evidence that would support a finding of negligence.[66]

The court found that the exclusive remedy for claims against the United States for the tortuous or negligent conduct of its employees falls under the FTCA.[67] Suits filed under the FTCA are limited to those that involve claims arising from "the negligent or wrongful act or omission of any employee of the Government ... acting within the scope of his office or employment."[68] The court found that all of the circumstances indicated that Dr. Sanchez, Dr. Ramon, and Dr. Fernandez-Rocha were not employees of the Family health center.[69] The court also refused to find the defendants to be contractors within

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[59]Delvalle, 170 F. Supp. 2d at 1257-1258.
[60]*Id.*
[61]*Id.*
[62]*Id.*
[63]*Id.*
[64]Delvalle, 170 F. Supp. 2d at 1258.
[65]*Id.*
[66]*Id.*
[67]*Id.* at 1263.
[68]*Id.*
[69]Delvalle, 170 F. Supp. 2d at 1266.

the scope of FSHCAA.[70] Furthermore, plaintiffs' argument that the United States was estopped from arguing that the doctors and professional association was not covered by the FTCA was rejected by the court.[71]

The court granted the United States motion for summary judgment, Mercy hospital's motion for summary judgment was granted in part and denied in part, count VIII of the fourth amended complaint was dismissed, and all other motions were denied.[72] *Delvalle v. Sanchez, 170 F. Supp. 2d 1254,1272 (S.D. Fla. Sep. 25, 2001).*

ERISA Does Not Require Health Maintenance Organization (HMO) to Disclose Its Physician Incentive Plan

The United States District Court for the Eastern District of Pennsylvania held that the failure of an HMO to disclose information regarding its physician compensation scheme was not a breach of its Employment Retirement Insurance Security Act (ERISA) fiduciary duty.[73]

Plaintiff enrolled into her employer's health plan which was operated by defendant.[74] Plaintiff alleged that the defendant misrepresented the amount of insurance coverage provided to its subscribers.[75] She argued that defendant misrepresented the scope of insurance coverage because the physicians' financial incentives compromised the independent medical judgment of physicians, and the health plan stated that patients were covered for all medically necessary treatments.[76] Plaintiff argued this information was misleading, because defendant's health plan provided physicians with financial disincentives to provide optimal health care.[77] She alleged that the fiduciary duties imposed on defendant by ERISA §404 prohibited

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[70] *Id.* at 1271.
[71] *Id.*
[72] *Id.* at 1279.
[73] Horvath v. Keystone, 2000 U.S. Dist. LEXIS 3042.
[74] *Id.* at *1
[75] *Id.* at *3.
[76] *Id.*
[77] *Id.*

misrepresentations, and that defendant was liable for failing to disclose physician incentive plan to its subscribers.[78]

Plaintiff alleged that defendant violated its fiduciary duty imposed by §404 of ERISA, because defendant misrepresented the scope of its insurance coverage.[79] She further contended that the physician incentives encourage physicians to provide patients with less care.[80]

Plaintiff demonstrated the absence of a genuine issue of material fact.[81] Defendant moved for summary judgment, and stated that §404a of ERISA provides that an ERISA fiduciary must perform "its functions in the interest of the beneficiaries of the plan with care, skill, prudence, and diligence under the circumstances then prevailing."[82]

The district court disagreed with plaintiff stating that there was no factual proposition that defendant was on notice that plaintiff requested its physician incentive scheme.[83] The court further determined that a physician's medical judgment was not compromised, and plaintiff did not make any requests that would cause defendant to disclose physician information.[84] Defendant's motion for summary judgment granted.[85] *Donna Horvath v. Keystone Plan East, Inc., 2000 U.S. Dis. LEXIS 3042.*

Scope of the Civil Enforcement Provisions of ERISA

United States District Court held the court did not have subject matter jurisdiction, and Plaintiffs' Motion to Remand was granted.[86]

The plaintiffs sued Aetna for alleged negligent, grossly negligent, and malicious acts and omissions related to health care decisions that affected them.[87] Plaintiffs brought the suit in relation to injuries

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[78]Horvath, 200 U.S.Dist LEXIS at *4.
[79]*Id* at *5.
[80]*Id.*
[81]*Id.*
[82]*Id.*
[83] Horvath, 200 U.S.Dist LEXIS at *19.
[84]*Id.* at *22-23.
[85]*Id.* at *1.
[86]Ruacho v. Aetna U.S. Healthcare of North Texas, Inc., 2001 U.S. Dist. Lexis 16053 *1 (U.S. Dist., Oct. 5, 2001).
[87]*Id.* at *2.

purportedly caused by a cost reduction agreement between Aetna and physicians that participate in Aetna's health plans, and because Aetna allegedly failed to adequately screen its participating physicians.[88]

The cost reduction component of the plaintiffs' claim related to a "C-section Incentive Plan" that Aetna uses to encourage participating physicians to avoid performing cesarean section deliveries.[89] The plaintiffs contended that this incentive motivated their physician to delay conducting a C-section delivery of the plaintiffs' baby, and the vacuum extractor the physician was attempting to use caused the baby scarring and lifelong debilitating injury.[90]

Aetna removed the state court action and based jurisdiction on diversity of citizenship and federal questioning the form of complete preemption by the Employment Retirement Income Security Act (ERISA).[91]

The court held no diversity jurisdiction existed since both the plaintiffs and the defendants were citizens of Texas.[92] Hence the court only reviewed whether it had subject matter jurisdiction to hear the case.[93] The only way Aetna could have proved subject matter jurisdiction was to show the plaintiffs' claim was completely preempted by ERISA.[94]

The court followed the Fifth Circuit's *Heimann* decision which stated that a cause of action was not completely preempted unless the claim was preempted by 29 U.S.C. § 1144(a) and fell within the scope of section 1132(a)'s enforcement provisions.[95] The court held that although Aetna's employee benefit plan which covered plaintiffs was governed by ERISA, the statutory ERISA preemption provision did not apply since plaintiffs' claims were not within the scope of the civil enforcement provisions of ERISA.[96] Therefore, the motion to remand

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[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Ruacho*, 2001 U.S. Dist. Lexis 16053 at *2.
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] *Id.* at *3-4.
[96] *Ruacho*, 2001 U.S. Dist. Lexis 16053 at *1.

was granted.[97] *Ruacho v. Aetna U.S. Healthcare of North Texas, Inc., 2001 U.S. Dist. Lexis 16053 *1 (U.S. Dist., Oct. 5, 2001).*[98]

EXPERT WITNESS

Expert Testimony Necessary To Establish Res Ipsa Loquitor

The Court of Appeals of North Carolina held that expert testimony was needed to establish the standard of care for res ipsa loquitor.[99]

Plaintiff went to the emergency room for a kidney problem and was given a drug called gentamicin.[100] Plaintiff began suffering from dizziness and vomiting.[101] Plaintiff visited several physicians and explained her symptoms.[102] Each physician ran tests but did not properly diagnose plaintiff.[103] Two months later, the physician told her that the drug used for her kidney problem had burned out her ear.[104] Plaintiff continued to suffer from nausea, loss of equilibrium, and dizziness.[105] Plaintiff alleged that defendants prescribed her a drug that was known to have specific side effects, and defendant did not warn plaintiff of the side effects.[106] Plaintiff also argued that defendants failed to monitor the drug, and her injuries occurred because of the drug.[107] Plaintiff alleged res ipsa loquitor and prefiling certification of Rule 9(j) violated the North Carolina Constitution and equal protection clause.[108]

Defendant filed a motion to dismiss.[109] The district court allowed the defendant's motion to dismiss, because it failed to state a claim for

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[97] *Id.*
[98] *Id.*
[99] Anderson v. Dr. Dean George Assimos, 553 S.E. 2d 63 (2001).
[100] *Id.* at 8.
[101] *Id.* at 2.
[102] *Id.*
[103] *Id.* at 4.
[104] Anderson, 553 S.E.2d at 4.
[105] *Id.*
[106] *Id.* at 5.
[107] *Id.*
[108] *Id.*
[109] Anderson, 553 S.E.2d at 6.

negligence.[110] Plaintiff argued that she suffered an injury, the injury did not occur without negligence of another individual, and the injury was under the control of the defendant.[111]

The court reasoned that the jury needed expert testimony to explain the side effects of gentamicin, and possible harm from defendant's failure to monitor the plaintiff while taking the drug.[112] The court held that res ipsa loquitor did not apply to plaintiff's negligence action.[113] Plaintiff also argued that the trial court erred in dismissing her complaint because Rule 9j was unconstitutional.[114] Rule 9j restricted a party's right to file a negligence claim against a health care provider.[115] The court appropriately reasoned that rule 9j was unconstitutional and void, and reversed and remanded to the trial court.[116] *Anderson v. Dr. Dean George Assimos, 553 S.E. 2d 63 (2001).*

NEGLIGENCE

A Preponderance Of Evidence Proved That There Was No Breach of Standard Of Care Issued to Plaintiff

The Court of Appeal of Louisiana, Second Circuit, affirmed the decision of the lower court, which found in jury trial that the defendants did not breach their standard of care.[117]

Emmette Johnson went to the emergency room of Union General Hospital in Farmville, La. On July 30, 1996, with complaints of right lower quadrant abdominal pain.[118] Johnson was examined by Dr. Paul Malabanan, who diagnosed her with acute abdomen and

[110] *Id.*
[111] *Id.* at 4.
[112] *Id.* at 8.
[113] *Id.*
[114] Anderson, 553 S.E.2d at 8.
[115] *Id.* at 15.
[116] *Id.* at 15.
[117] Johnson et al v. St. Francis Medical Center, Inc., et all, 799 So. 2d 671, 672 (C.A. La. Oct. 31, 2001).
[118] *Id.* at 672-673.

suspected appendicitis.[119] Johnson was transferred by ambulance to St. Francis Hospital, where he was to be under the care of Dr. John Price.[120] Johnson was examined at St. Francis and found to be in no acute distress and was admitted into a room.[121] The next day Johnson was examined and was noted to be in mild distress with a "washed out" appearance.[122] Additional exams and test were run by Dr. Price but no actions were taken.[123] During that morning, Johnson's condition worsened, his blood pressure was down, and his abdomen was tender.[124] Dr. Price ordered that Johnson be transferred to the ICU.[125] While being examined in the ICU, Johnson coded.[126] Resuscitation was performed for half an hour before a pulse was obtained.[127] Johnson was taken to surgery and was found to have a ruptured abdominal aortic aneurysm.[128]

The plaintiff argued that the evidence clearly established that Johnson had an abdominal aortic aneurysm upon arrival at St. Francis and that had his condition been diagnosed and treated earlier, Johnson would have had an increased chance of survival.[129] Plaintiff also argued that the jury did not address whether the treatment provided by Dr. Eldridge and Dr. Price fell below the standard of care applicable to each, but instead determined that Johnson did not lose a chance of survival.[130] The court found that although there was expert testimony which included some criticism of the care rendered by the defendants, the preponderance of the evidence showed that there had been no breach in the standard of care.[131] Only one expert unequivocally testified that the defendants breached the standard of care.[132]

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[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Johnson, 799 So. 2d at 673.
[123] *Id.*
[124] *Id* at 674.
[125] *Id.*
[126] *Id.*
[127] Johnson, 799 So. 2d at. 674.
[128] *Id.*
[129] *Id.* at 675.
[130] *Id.*
[131] *Id.* at 680.
[132] Johnson, 799 So. 2d at 160.

Accordingly, the judgment of the trial court was affirmed at the appellants' cost. [133] *Johnson et al v. St. Francis Medical Center, Inc., et all, 799 So. 2d 671, 672 (C.A. La. Oct. 31, 2001).*

Physician Has Duty To Mother And Unborn Fetus

The Supreme Court of Kansas held that: 1) a physician who has a physician patient relationship with a pregnant woman has a duty to the pregnant woman and a duty to the fetus; and 2) a pregnant woman has a right to know that she has an infectious disease that could be transmitted to her baby during labor and delivery.[134]

The plaintiff's parents brought action against the physician and the hospital on behalf of plaintiff.[135] Plaintiff's mother was pregnant and treated by more than one physician during her pregnancy.[136] Early in plaintiff's mother's pregnancy, laboratory test revealed that she was a carrier of hepatitis B.[137] Plaintiff's mother showed no symptoms and had no other health problems.[138] Plaintiff's mother was never told that she had hepatitis or that she could pass hepatitis B to plaintiff during the pregnancy.[139] Each physician had access to plaintiff's mother's medical records but neither informed plaintiff's mother of her laboratory results or reviewed her medical records.[140] Hepatitis B status was not transferred to the plaintiff's medical charts.[141] When plaintiff was delivered, the pediatrician did not order post-delivery treatment.[142] Two years after plaintiff's delivery, plaintiff's mother had a hysterectomy and she was told that she had hepatitis B.[143] She was told that hepatitis B was extremely contagious and that she should have

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[133] *Id.*
[134] Nold v. Binyon, 31 P.3d 274 (2001).
[135] *Id.* at 277.
[136] *Id.* at 278.
[137] *Id.*
[138] *Id.*
[139] Nold, 31 P.3d at 277.
[140] *Id.* at 279.
[141] *Id.* at 281.
[142] *Id.*
[143] *Id.*

her family tested.[144] Plaintiff tested positive for the hepatitis B antigen.[145]

The district court entered judgment for the plaintiff.[146] The district court excluded the expert testimony by plaintiff's expert regarding the breach of the standard of care by medical facility's nurses.[147] Defendants argued that their motion to strike the expert witness and its trial brief were not included in the record on appeal.[148] Defendants contended that these should be have been included on the record at appeal.[149] The district court found that a physician of a pregnant woman also has a duty to care for her fetus.[150] If a pregnant woman has an infectious disease, the duty does not end until preventive medical care is provided.[151]

The court remanded to the lower court to specify the specific allegations of negligence supported by the evidence.[152] The court also held that a physician that has a physician-patient relationship with a pregnant woman and the same relationship with her fetus.[153] Also the court found that a mother has a right to know if she has an infectious disease that can be transmitted to her baby during labor and delivery.[154] *Nold v. Binyon, 31 P.3d 274 (2001).*

A Visit to Cardiologist after Surgery does not Fall within the Scope of Continuous Treatment Doctrine

The United States District Court for the Southern District of New York held the patient's visit to her cardiologist after her surgery did not fall within the scope of the continuous treatment doctrine, and the nexus between the cardiologist and the doctor was not strong enough to

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[144]Nold, 31 P.3d at 281.
[145]*Id.*
[146]*Id.* at 277.
[147]*Id.* at 281.
[148]*Id.* at 281.
[149]Nold, 31 P.3d at 281.
[150]*Id.* at 285.
[151]*Id.*
[152]*Id.* at 289.
[153]*Id.*
[154]Nold, 31 P.3d at 289.

sustain the application of the toll.[155] Furthermore, the patient's equitable estoppel argument was rejected because she failed to allege a claim of fraudulent concealment.[156]

The plaintiff instituted an action of medical malpractice against Dr. Girardi claiming he negligently grafted a segment of plaintiff's greater saphenous vein onto a right coronary vein instead of her right coronary artery during a 1997 surgery.[157] Plaintiff claims that this effectively caused a fistula that shunted the affected flow of blood from her heart into a self-contained systemic loop that sealed off the flow of blood from its normal course through the circulatory system.[158] Plaintiff further claims that Dr. Girardi's negligence aggravated the damage to plaintiff's heart and exposed her to subsequent life-threatening surgical procedures.[159] Plaintiff also seeks to hold New York Hospital vicariously liable as the employer of Dr. Girardi.[160]

Defendants moved for summary judgment, stating that the action was barred due to the fact that the statute of limitations had run for the medical malpractice actions.[161] Plaintiff countered that the statute of limitations should be tolled by the continuous treatment doctrine.[162] The continuous treatment doctrine tolls the statute of limitations when the course of treatment which includes the wrongful acts or missions has run continuously and is related to the same original condition or complaint.[163] Plaintiff alleged that the complaint began with the August 18, 1997 surgery performed by Dr. Girardi, and her last visit to Dr. Girardi's office occurred on October 6, 1997.[164] Plaintiff argued that the treatment she received from her cardiologist after surgery should have been imputed to Dr. Girardi because of the "nexus" between the doctors.[165] However, the court found the

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[155]Haq v. Girardi, 2001 U.S. Dist. Lexis 16109 *1 (U.S. Dist. Ct. Sept. 26, 2001).
[156]*Id.*
[157]*Id.* at *2.
[158]*Id.*
[159]*Id.*
[160]Haq, 2001 U.S. Dist. Lexis 16109 at *2.
[161]*Id.*
[162]*Id.*
[163]*Id.*
[164]*Id.*
[165]Haq, 2001 U.S. Dist. Lexis 16109 at *3.

treatment of Plaintiff by Dr. Herrold could not be imputed to Dr. Girardi without finding some showing of agency or other relevant relationship between the two doctors.[166] The court found no relationship other than that the two doctors were colleagues within the same hospital, and this was not enough to amount to an agency relationship.[167] The court also held that the hospital could not be found liable since plaintiff did not address the hospital's liability in her brief in opposition to defendant's motion.[168] In addition, Dr. Girardi was not an employee of the hospital, so the hospital could not therefore be held vicariously liable for treatment administered by a private attending physician.[169]

Finally, the court rejected plaintiff's argument that defendants should be estopped from invoking the statute of limitations because plaintiff was deliberately misled about her murmur.[170] The court reasoned that plaintiff failed to mention this allegation in the complaint and even if this allegation appeared in the complaint, plaintiff did not argue that there was any fraudulent concealment in the case.[171] Therefore, the defendants' motion for summary judgment was granted and the complaint was dismissed as time-barred.[172] *Haq v. Girardi, 2001 U.S. Dist. Lexis 16109 *1 (U.S. Dist. Ct. Sept. 26, 2001).*

Physician Has Duty To Inform Patient That He Performed Procedure Improperly

The Louisiana Court of Appeals held that a physician's failure to inform a patient was a breach of his duty. [173]

Plaintiff decided that she wanted a bilateral tubal ligation after giving birth to her baby.[174] Defendant performed the procedure one-

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[166]*Id.* at *4.
[167]*Id.*
[168]*Id.*
[169]*Id.*
[170]Haq, 2001 U.S. Dist. Lexis 16109 at *1.
[171]*Id.* at *5.
[172]*Id.*
[173]Smith v. Richard J. Clement, M.D. 797 So.2d 151 (2001).
[174]*Id.*

month after she delivered her baby.[175] Defendant's medical report indicated that he removed a part of each fallopian tube.[176] Defendant sent two samples from the operation to the pathology department for examination.[177] The pathology report indicated that one sample was from the fallopian tube while the other sample was tissue.[178] Plaintiff met with defendant twice but was not told of the findings or informed that she needed to take additional precautions to prevent pregnancy or consider additional surgery.[179] Eleven months later plaintiff was pregnant.[180] Plaintiff filed claim against defendant alleging that defendant did not perform the procedure properly, did not verify the procedure was performed properly, did not inform plaintiff the surgery was performed improperly, and did not tell plaintiff to take precautions against pregnancy.[181] Defendant waived his right to appear before a medical review panel and plaintiff sued.[182] Plaintiff entered a default judgment against defendant.[183] The trial court allowed defendant a default judgment and awarded plaintiff damages in the amount of $192,749.05.[184] Defendant filed a motion for a new trial claiming that he had not been served with a petition.[185] Defendant also alleged that plaintiff had not established a prima facie case against defendant.[186] The Patient Compensation Fund (PCF) intervened and appealed on defendant's behalf.[187]

On appeal, the PCF argued that plaintiff did not establish a case against defendant and claimed the damages were an error.[188] Plaintiff

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[175] *Id.*
[176] *Id.* at 154.
[177] *Id.* at 154.
[178] Smith, 797 So.2d at 154.
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] Smith, 797 So.2d at 154.
[184] *Id.*
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] Smith, 797 So.2d at 154.

sought damages and attorney fees and asserted that PCF had no right to intervene or to be granted an appeal in this matter.[189]

The appellate court found that plaintiff established a prima facie case.[190] It also found that defendant had a duty to take reasonable care to perform the litigation properly and if he did not perform the procedure properly he had a duty to tell plaintiff.[191] The court held that defendant's failure to inform plaintiff that the procedure might not have been performed properly was a breach of his duty, and plaintiff established a prima facie case of negligence.[192] *Smith v. Richard J. Clement, 797 So. 2d 151 (3d Cir. 2001).*

Estates can be Liable for Physician's Malpractice

The Court of Appeals of Texas affirmed the trial court's ruling that the defendant was guilty of medical malpractice.[193]

Defendant, Swicegood, was a family practice physician with the Hull-Swicegood Clinic.[194] Plaintiff had been a patient of defendant since 1990.[195] On April 28, 1993, plaintiff saw defendant about a cold.[196] At this appointment plaintiff informed him that she could not afford to continue to be his patient.[197] Defendant told her he would continue to treat her free of charge.[198] Defendant also asked for her home phone number.[199] Shortly after this appointment, defendant called plaintiff and set up a meeting outside of the office.[200] Defendant began a relationship with plaintiff.[201] This relationship became progressively more controlling, and as a result, plaintiff became

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[189] *Id.*
[190] *Id.* at 157.
[191] *Id.*
[192] *Id.*
[193] Hull-Swicegood Clinic v. Dean, 2001 Tex. App. Lexis 7745 at *1 (2001 Tex. App., Nov. 20, 2001).
[194] *Id.* at *2.
[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] Hull-Swicegood Clinic, 2001 Tex. App. Lexis 7745 at *2.
[199] *Id.*
[200] Hull-Swicegood Clinic, 2001 Tex. App. Lexis 7745 at *2.
[201] *Id.*

depressed.[202] Defendant failed to provide antidepressants or refer her to a psychiatrist or psychologist.[203] Plaintiff eventually attempted to commit suicide.[204]

Plaintiff filed suit against Swicegood, Hull, and the Clinic in June 21, 1994.[205] Defendant Swicegood committed suicide on December 6, 1996, and his wife as executrix of his estate was substituted as a defendant.[206] Plaintiff asserted causes of action against the estate for medical malpractice and against the Clinic for negligent supervision.[207] Plaintiff also asserted that the Clinic was vicariously liable for Swicegood's malpractice because Swicegood was an employee of the Clinic and injured plaintiff in the course of his employment.[208]

The case was tried to a jury, which found Swicegood negligently caused eighty percent of plaintiff's damages and the Clinic negligently caused twenty percent of her damages.[209] The jury also found plaintiff suffered actual damages and assessed exemplary damages of one million against the estate.[210] The trial court found no evidence supporting the finding that the clinic was negligent and set aside this finding.[211] However, the court ruled the clinic was vicariously liable for Plaintiff's actual damages.[212] The estate appealed stating the trial court erred in not submitting the jury charge requiring the jury to determine Plaintiff's comparative fault.[213] The court found that these instructions were not in correct form and therefore the trial court did not err in refusing to submit them.[214] In addition, the Clinic asserted that no evidence exists to support the jury's finding that Swicegood

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[202]*Id.* at *4.
[203]*Id.*
[204]Hull-Swicegood Clinic, 2001 Tex. App. Lexis 7745 at *4.
[205]*Id.*
[206]*Id.*
[207]*Id.* at *5.
[208]*Id.*
[209]Hull-Swicegood Clinic, 2001 Tex. App. Lexis 7745 at *5.
[210]*Id.*
[211]*Id.*
[212]*Id.*
[213]*Id.* at *6.
[214]Hull-Swicegood Clinic, 2001 Tex. App. Lexis 7745 at *6.

was acting within the scope of employment.[215] The court held that the verdict should be set aside only if it is so contrary to the overwhelming weight of evidence as to be clearly wrong and unjust.[216] Since however, the clinic allowed off-site, off-record and no-charge treatment, the doctor's abandonment of plaintiff's care was within the scope of his employment.[217]

Finally, the estate encouraged the court to overrule *Hofer v. Lavender*, which recognized the right to collect exemplary damages from the estate of a deceased tortfeasor.[218] The court ruled this case could not be overturned since the state legislature combined this case law into statutory law under Chapter 41 of the Texas Civil Practice and Remedies Code.[219] The court further held the determination of an appropriate amount of exemplary damages is within the discretion of the jury.[220] The court affirmed the trial court's judgment.[221] *Hull-Swicegood Clinic v. Dean, 2001 Tex. App. Lexis 7745 at *1 (2001 Tex. App., Nov. 20, 2001).*

PRODUCT LIABILITY

A Claim Arising Out of a Defective Blood Transfusion Does Not Fall Within the Scope of §5628

The Supreme Court of Louisiana, on writ of certiorari to the Court of Appeal of the Second Circuit, held a product liability claim arising out of a defective blood transfusion was not within the scope of §5628 and remanded the case to district court for further proceedings.[222]

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[215] *Id.* at *7.
[216] *Id.*
[217] *Id.* at *1.
[218] *Id.* at *8.
[219] Hull-Swicegood Clinic, 2001 Tex. App. Lexis 7745 at *8.
[220] *Id.* at *10.
[221] *Id.*
[222] Williams v. Jackson Parish Hospital, 2001 La. LEXIS 2864 at *1 (S.C. of La. Oct 16, 2001).

On May 29, 1980, Nelson Nadine Wilson, plaintiff, received a blood transfusion during childbirth at Jackson Parish Hospital.[223] A decade and a half later, William's doctor informed her that she had contracted Hepatitis C, which most likely resulted from the blood transfusion which had occurred in 1980.[224] On April 17, 1997, Williams filed a complaint with the Patient's Compensation Fund pursuant to the Medical Malpractice Act.[225] Williams alleged that Jackson Parish Hospital was strictly liable for the damages incurred by the 1980 sale and administration of defective blood or blood products.[226] Alternatively, Williams alleged that the hospital "deviated from the applicable standards of appropriate medical care regarding the collection, testing, sale and administration of blood or blood products and the care and treatment which they provided to Nelson Nadine Williams."[227]

In response, Jackson Parish Hospital filed an exception of prescription in the district court citing the one year and three year prescriptive periods of §5628.[228] The district court found that even though Williams filed within one year of discovering her cause of action, the claim was governed by the three year statute of limitations, which must be filed within three years of the complained of act, in this case the blood transfusion.[229] The district court refused to reach the constitutionality of §5628 because the issue was not the focus of the argument, regardless of the fact that there was no way for Williams to comply with the three year deadline because the error was not found until after the three year period expired.[230]

On appeal, Williams argued that the general tort prescriptive period, which is one year form the date of discovery, applied to her strict liability cause of action. [231] The court of appeals affirmed the findings of the district court that William's claim was prescribed under

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[223] *Id.* at *2.
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] Williams, 2001 La LEXIS 2864 at *2.
[228] *Id.*
[229] *Id.*
[230] *Id.* at *3.
[231] *Id.*

the three-year period under §5628, but remanded the case to district court for a hearing on the constitutional issues.[232] After an evidentiary hearing on demand, the district court adopted its earlier findings regarding the application of §5628.[233] The case was then appealed to the Supreme Court.

In deciding this case, the court looked at the earlier decision of *Boutte v. Jefferson Parish Hospital Service District No. 1, 759 So.2d 45,* where the Supreme Court of Louisiana reasoned that because a strict products liability claim was statutorily defined as "malpractice" under the MMA, it likewise met §5628's second requirement that the action arise out of "patient care."[234] Here, the court found the ruling in Boutte to be a mistake, and overruled the decision for five reasons: 1) Boutte ignored well established principles of interpreting prescriptive statutes; 2) Boutte ignored the Legislature's placement of §5628 as a separate statutory provision, apart from either the MMA or the MSLLA, and ignored the existence in §5628 of its own conduct-based standard that governs the scope of its application; 3) Boutte failed to recognize the lack of any evidence suggesting legislature intended the MMA's expanded definition of malpractice to apply in any context other than the MMA; 4) relying on Boutte's analysis in future cases will lead to questionable, if not constitutionally infirm, results; and 5) Boutte ignores §5628's legislative history.[235] Accordingly, the court reversed the decision of the court of appeals and remanded the case to district court for further proceedings.[236] *Williams v. Jackson Parish Hospital, 2001 La. LEXIS 2864 at *1 (S.C. of La. Oct 16, 2001).*

[232]Williams, 2001 La LEXIS 2864 at *3.
[233]*Id.* at *3-4.
[234]*Id.* at *12.
[235]*Id.* at *13-16.
[236]*Id.* at *16.

WRONGFUL DEATH

Hospital's Advice Line That Follows Proper Protocol Not Liable For Death

The Court of Appeals of Ohio held that an advice line that followed proper protocol was not liable for plaintiff's death.[237]

Plaintiff's administrix died shortly after being born prematurely.[238] The administrix filed suit against the defendant and the medical staff that treated her.[239] The administrix alleged that defendant's medical advice line told her to go to the hospital until the following morning.[240] The administrix also alleged that the delivering obstetrician told her that if she had come the previous evening they could have stopped her labor.[241]

The administrix asserted claims for medical malpractice, wrongful death, violation of her right to access of her medical records, and spoliation of evidence.[242] Defendants moved to dismiss all but the wrongful death and loss of the chance of survival claims.[243] The trial court ruled in favor of defendants.[244] The administrix appealed.[245] The administrix contended that the expert testimony was a surprise, the trial court should not have denied the motion for judgment notwithstanding the verdict, and the trial court erred in denying the motion for a new trial.[246]

The court found that the expert's testimony did not exceed the scope of his report.[247] The court reasoned that there was no unfair surprise.[248] The court further reasoned that the jury could have reached

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[237]Preston v. Kaiser Permanente, 2001 Ohio App. Lexis 4988.
[238]*Id.* at 23.
[239]*Id.* at 2.
[240]*Id.*
[241]*Id.*
[242]Preston, 2001 Ohio App. Lexis at 2.
[243]*Id.*
[244]*Id.*
[245]*Id.*
[246]*Id.* at 10.
[247]Preston, 2001 Ohio App. Lexis at 14.
[248]*Id.*

different conclusions from the evidence presented and properly denied the motion for judgment notwithstanding the verdict.[249] Furthermore, the advice line followed protocol by administering treatment, and the administrix failed to show the nurses were negligent.[250] The court affirmed the lower courts' decision.[251] *Preston v. Kaiser Permanente, 2001 Ohio App. Lexis 4988.*

ANTITRUST

Bid to Provide Health Care Services to Aircraft Company does not Violate Antitrust Statutes

The United States District Court denied plaintiff's Motion for a Preliminary Injunction against defendant health care company's bid and held that defendant's contract stands.[252]

Plaintiff brought an antitrust action alleging that defendant engaged in a scheme under which plaintiff was underbid on a contract to provide health insurance to employees of an aircraft company.[253] Plaintiff raised claims of anticompetitive conduct in violation of Sections 1 and 2 of the Sherman Act by predatory pricing.[254] Plaintiffs also contended that defendant's actions represented unlawful use of defendant's alleged monopoly powers and that defendant tortiously interfered with its contractual rights.[255]

To obtain the injunctive relief, the court stated plaintiff must show that it would suffer irreparable harm without the injunction, that the injury to it outweighed any potential damages to the defendant, that the injunction was not adverse to the public interest, and that there was a substantial likelihood of prevailing on the merits.[256] In addition,

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[249] *Id.* at 17.
[250] *Id.* at 22.
[251] *Id.*
[252] Coventry Health Care of Kansas, Inc. v. Via Christi Health System, Inc., 2001 U.S. Dist. Lexis 21389 *1 (U.S. Dist., Dec. 19, 2001).
[253] *Id.* at *1.
[254] *Id.*
[255] *Id.*
[256] *Id.* at *14.

plaintiff must prove the claim of predatory pricing by showing proof of a relevant geographic and product market, specific intent of the defendant to monopolize the market, anticompetitive conduct by the defendant in furtherance of this attempt, and the dangerous probability that the defendant will succeed in this attempt.[257]

The court found that plaintiffs failed to present evidence showing an award of injunctive relief was necessary to protect them from irreparable injury, and failed to show a reasonable likelihood that they would prevail on the merits.[258] Furthermore, the court found that issuing a preliminary injunction would actually be adverse to the public interest.[259]

The evidence also did not show that defendants bid was based upon pricing below an appropriate measure of cost but rather suggested simply that defendant had a lower level of physician costs and was more efficient because of their adoption of the DRG-based reimbursement.[260] In addition, no evidence was available to establish a market in which defendants threatened to acquire the ability to impose supracompetitive pricing.[261] Instead, the evidence showed a strong market for managed care services in an area that was extremely competitive.[262] Any attempt to impose monopoly pricing would be met with a variety of responses that would destroy this attempt.[263] Therefore, given the evidence presented to the court, the plaintiff failed to demonstrate that preliminary injunctive relief was justified.[264] *Coventry Health Care of Kansas Inc. v. Via Christi Health System, Inc., 2001 U.S. Dist Lexis 21389 at *1 (U.S. Dist., Dec. 19, 2001).*

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[257]Coventry Health Care of Kansas, Inc., 2001 U.S. Dist. Lexis 21389 at *14.
[258]*Id.* at *20.
[259]*Id.*
[260]*Id.*
[261]*Id.*
[262]Coventry Health Care of Kansas, Inc., 2001 U.S. Dist. Lexis 21389 at *20.
[263]*Id.*
[264]*Id.*